FILE COPY.

Office Supreme Court
FILED
NOV 30 1903
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. ~~1094~~ 149.

FREDERICK W. LINCOLN AND OTHERS, TRADING AS COPARTNERS UNDER THE FIRM NAME AND STYLE OF H. W. PEABODY & COMPANY, PLAINTIFFS IN ERROR,

against

THE UNITED STATES, DEFENDANT IN ERROR.

MOTION TO ADVANCE.

HENRY M. WARD,
For Plaintiffs in Error.

PAUL FULLER,
FREDERIC R. COUDERT, JR.,
Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 8793

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 491.

FREDERICK W. LINCOLN AND OTHERS, TRADING AS COPARTNERS UNDER THE FIRM NAME AND STYLE OF H. W. PEABODY & COMPANY, PLAINTIFFS IN ERROR,

against

THE UNITED STATES, DEFENDANT IN ERROR.

MOTION TO ADVANCE.

UNITED STATES OF AMERICA, *ss:*

And now come the plaintiffs in error and respectfully move the court to advance this cause, under paragraph 5 of rule 26, and set it down for hearing upon such day as may be most convenient to the court.

The motion is made for the following reasons:

This is a suit brought in the district court of the United States for the southern district of New York as a court of claims under the act of March 3, 1887, entitled "An act to provide for the bringing of suits against the Government of the United States," 1 Sup. R. S., 559, commonly known as the

Tucker act, by a citizen of the State of New York and citizens of other States, members of the firm of H. W. Peabody & Company, against the United States, to recover the sum of seven hundred and thirteen dollars and forty-eight cents ($713.48). It is set out in the petition that the petitioners shipped certain articles, the growth, produce, or manufacture of certain of the States, from the port of New York to the port of Manila, in the Philippine islands; that on the arrival of the vessel on which these articles were carried the military authorities of the United States, acting under certain orders of the President, levied certain customs duties thereon and compelled the payment thereof by duress of goods, in violation of the Constitution and of the treaty with Spain. These duties were exacted on various dates between December 13, 1900, and January 26, 1901. In the court below the United States filed an answer admitting substantially all of the facts set forth in the petition and set up as an affirmative defense that at the time of the importations in question there existed an armed insurrection in the Philippine islands whereby the territory of the islands was rendered hostile and trade with such hostile territory was unlawful, and that while the town and port of Manila at the times referred to in the petition were in the actual possession of the United States such possession was challenged and interfered with by hostile insurrectionary military forces and was held by the United States only by force of arms, and that the duties in question were imposed as a condition upon the privilege of trading with hostile territory and were properly enforced as an exercise of the belligerent rights of the United States arising from the conditions then existing in said islands, and that the right of the President to exact the duties in question was justifiable as an exercise of the war powers of the United States in territory affected by an armed insurrection.

The petitioners, believing that said answer does not set out any facts except facts which do not require to be proved

and of which the court will take judicial notice, and being advised by counsel that the court in taking judicial notice of facts is not bound by the averments of the pleadings, demurred to the sufficiency of the answer. This demurrer was overruled by the district judge, and, the petitioners electing to stand upon their demurrer, an order and judgment were entered dismissing the petition on the merits. The cause was then brought here directly by writ of error.

The procedure adopted is substantially the same as that approved by this court in the case of *Dooley v. United States*, 182 U. S., 222. The duties were collected under the alleged authority of an order of the President, which is substantially identical with that which was brought before this court in the *Dooley* case, which order this court held did not apply to articles imported into Porto Rico from the United States after the date of the ratification of the treaty with Spain—April 11, 1899. The points on which counsel rely for a reversal are that the case is covered by the decisions in the first *Dooley* case, 182 U. S., 222, and in the *Diamond Rings* case, 183 U. S., 176; that the President had not the power to impose the duties in question, and that such imposition of duties is in violation of the various provisions of the Constitution specified in the assignment of errors. They therefore respectfully urge that this cause, which is of great public interest, be advanced on the calendar and set for a hearing at as early a date as may be convenient to the court. They understand that the Attorney General does not oppose this application.

Respectfully submitted.

HENRY M. WARD,
For Plaintiffs in Error.

PAUL FULLER,
FREDERIC R. COUDERT, JR.,
Counsel.

Dated NOVEMBER 30, 1903.

[Endorsed:] United States Supreme Court, October term, 1903. No. 491. Frederick W. Lincoln and others, trading as copartners under the firm name and style of H. W. Peabody & Company, plaintiffs in error, against The United States, defendant in error. Motion to advance. Henry M. Ward, attorney for plaintiffs in error; office and post-office address, No. 32 Nassau street, borough of Manhattan, city of New York.